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OPINIONS**

**SUPERIOR COURT OF NEW JERSEY
COUNTIES OF
ATLANTIC AND CAPE MAY**

CAROL E. HIGBEE, P.J.Cv.

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MEMORANDUM OF DECISION

CASE: In Re Bextra/Celebrex

DOCKET #: ATL-L-8367-05MT

DATE: Monday, December 03, 2007

MOTION: The Court's Own Motion To Prevent Injustice by Relaxing
Rule 4:5A-2, Notice of Track Assignment

ATTORNEYS: By The Court Itself

THIS MATTER comes before the court on the Court's own motion.

A practice has come to the Court's attention that appears to have the potential to create manifest injustice upon the rights of the People of the United States to file in the State Courts cases that traditionally belong in State Courts. Essentially, an out-of-state plaintiff, having chosen to avail himself or herself of the Courts of the State of New Jersey and having filed suit and served their complaint against a defendant domiciled in the State of New Jersey, should not be able to have their suit removed to the United States District Court for the District of New Jersey based on a time delay because of the way the State processes complaints. The party bringing the action has the choice of filing in Federal Court or the State Court where the defendant is domiciled. For years it has been accepted that an in-state domiciled defendant may not remove a case to the United States District Court from the defendant's State Court. There

has recently begun a practice best described as a strategic-end run around this long standing understanding of the law.

The Federal Removal Statute, 28 U.S.C. §1441(b), states in relevant part “Any civil action [which arises from a Federal Question] shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest *properly joined and served* as defendants is a citizen of the State in which such action is brought.” (emphasis added). It has long been understood that this statute preserved the right to file in a State Court forum. However, defendants recently in other mass tort litigation have removed otherwise properly filed cases in the New Jersey State Court by removing them to Federal Court before the plaintiffs have had time to even serve their complaints. The defendants subscribe to an internet service that provides them for a fee with New Jersey docket numbers before the plaintiff gets the docket number and the Track Assignment Notice (TAN). They then race to the Federal Court to defeat the plaintiff’s choice of forum in cases where after service of the complaint, they would have no right of removal. This is possible, because under R. 4:5A-2, a plaintiff must wait for a TAN to be issued before they are permitted to serve process on a defendant. This is different than the federal system, in which the Public Access to Court Electronic Records (“PACER”) and Case Management/Electronic Case Files (“CM/ECF”) systems allow nearly instantaneous notification of service and docketing. An out-of-state plaintiff filing in the state court, may find his or her case removed to the District Court by virtue of a loophole in the Federal statute and a slower filing system in State Court. The defendant can hire a paid service to monitor the Court’s Automated Case Management System (“ACMS”)), and then sending a courier to the clerk’s office to obtain a copy of the complaint before a TAN is issued or a paper file opened (both of which have occurred in other litigation in

this Court recently), and race to the District Court to file a motion for removal, before the plaintiff can get the docket number and TAN and serve the complaint in New Jersey.

Other Federal District Courts outside New Jersey have not allowed this end run around the State Courts. In Holmstrom v. Harad, Judge Aspen of the Northern District of Illinois held that §1441(b) does not permit removal prior to service on at least one party. Holmstrom v. Harad, No. 05-C-2714, 2005 U.S. Dist. LEXIS 16694 at *5-*7 (N.D. Ill. Aug. 11, 2005). That District Court recognized that despite the literal language of the statute, Congress could not have intended that a fast-acting defendant should be able to get their cases transferred to Federal Court and circumvent the state courts via strategic pre-service removal. The service language in §1441(b) was designed to protect defendants from plaintiffs who listed, among multiple defendants, a resident defendant of the forum state that they would not pursue but was merely added to the complaint to defeat removal. Holmstrom v. Harad, *supra*. See also Recognition Comm. Inc. v. American Automobile Assn., 1999 U.S. Dist. LEXIS 3010, No. Civ. A. 3:97-CV-0945-P (N.D. Tex. Mar. 5, 1999). To do otherwise allows a resident defendant to play games with the system and provide a vehicle for manipulating the removal statutes, going against what has long been understood as Congress's intent. Vargas v. Boeing Co., No. 06-C-3566, 486 F. Supp. 2d 726 (N.D. Ill. 2007) (discussing the jurisprudence of pre-service removal).

Although the District Court for the District of New Jersey has found they are bound by the literal words of the statute, they also recognized that this gives rise to the potential for this sort of abuse. They have recognized (as this Court does) that "...defendants...could easily monitor court dockets and immediately remove diversity cases prior to service...[enabling them] to prevent any plaintiff from pursuing a state court action against them." Thomson, *supra*, 2007 U.S. Dist. LEXIS 37990 at *10. The TAN requirement "creates a window during which a New

Jersey defendant can remove a case prior to service, thereby escaping the removal limitation of §1441(b) and eliminating any time period allotted for a plaintiff to serve the complaint.” Id.

This Court, in the Bextra/Celebrex litigation, now takes the initiative to resolve, in part, the situation, using my power under R. 1:1-2, which states that “any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice.” It is clear that requiring a plaintiff to await the issuance of a TAN is allowing for a manifest injustice. In fact, six recently filed cases in similar type of litigation in this court were removed to Federal Court before service could be effected because plaintiffs had to wait for a Tracking Assignment Notice to be issued to them. This Court therefore will relax the requirements of R. 4:5A-2 to allow service of process by a plaintiff on the defendants prior to the issuance of a TAN in the Bextra/Celebrex Litigation, as soon as a docket number has been assigned by the Clerk of the Superior Court, and plaintiff can then serve the TAN by certified and regular mail within ten days of the receipt by plaintiff. It is the Court’s intention to raise the issue on a wider basis than mass torts assigned to this Court with the Administrative Office of the Courts, and the proper committees of the Supreme Court of the State of New Jersey.


CAROL E. HOBEE, P.J.Cv.